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IN THE

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

BILL JONES,
Secretary of State of California, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. It stands for, among other things, the fundamental right of persons to associate for the development, communication, and furtherance of shared viewpoints and beliefs. Eagle Forum ELDF's mission is to enable conservative and pro-family men and women to participate individually and collectively in the process of self-government and public policy making so that America will continue to be a land of individual liberty, respect for family integrity, public and private

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

virtue, and private enterprise. Eagle Forum ELDF zealously pursues this mission through education and participation in significant legal cases.

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." The Institute pursues its mission through academic research, publications, scholarly conferences, and, through its Center for Constitutional Jurisprudence, the selective appearance as amicus curiae in cases of constitutional significance, including *Boy Scouts of America* v. *Dale* and *United States* v. *Morrison*, currently pending before this Court. Of particular relevance here, the Institute recently held a major conference on the role of political parties in the American constitutional system and has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations.

This case is of particular importance to amici because California's Proposition 198 effectively commandeers private associations and puts them into the service of an enforced public orthodoxy. The law compels political parties to open their doors to their ideological opponents and allows those opponents to compel each party to endorse candidates other than those whom the party members themselves desire to represent them. This grotesque assault on the core freedoms of political speech and association offends the Constitution.

STATEMENT

In order fully to appreciate the constitutional problems raised by Proposition 198, this Court should consider it within the context of the other California election laws. Resolution of this case turns on the interplay among Proposition 198 and those other laws, which results in a synergistic First Amend-

ment violation even though each law might be acceptable standing alone or in some other context.

There are two methods of gaining access to the ballot for most state and federal elective offices in California. The first method of ballot access is to receive the "nomination" of a qualified political party. California law "requires each party to select its candidate through a primary." *California Democratic Party* v. *Jones*, 984 F. Supp. 1288, 1300 (E.D. Cal. 1997), *aff'd* 163 F.3d 646 (CA9 1999).[2] "The person who receives the highest number of votes at a primary election as the candidate of a political party for the nomination to an office is *the nominee of that party* at the ensuing general election." Cal. Elec. Code § 15451 (emphasis added.).[3] The second method of ballot access is to obtain the signatures on a nominating petition of either 1% or 3% of the registered voters eligible to vote for the office being sought. § 8400. Anyone satisfying the petition requirement is listed on the ballot as an "independent" candidate, regardless any party affiliation. A candidate who sought but failed to receive a party nomination through the primary may not thereafter obtain ballot access by petition. § 8003.

This case involves a change to the direct primary by which the State requires qualified political parties to nominate candidates for public office. Because the purpose of the primary is to select a nominee for each of the several political parties, this is a "partisan" primary. Under a partisan primary system, therefore, each state-approved political party is given access to the general election ballot, and any particular candidate gains access to the general election ballot only by virtue of being a qualified party's nominee.

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[2] Because the Ninth Circuit adopted the district court opinion as its own, we will hereinafter cite directly to the district court opinion.

[3] Citations to the California Election Code will hereinafter be to the section number only.

Partisan primaries may be contrasted with "nonpartisan" primaries, which do not select *nominees* for political parties. Instead, nonpartisan primaries simply narrow the candidate field by subjecting candidates to an initial public vote, and then advancing a smaller group of the top vote recipients, regardless of party affiliation, to the final election ballot.[4]

Partisan primaries are of several types – closed, open, and blanket – and much of the discussion in the court below involved comparing these different types and their relative impacts on parties. Both closed and open primaries offer electors a primary ballot containing only the prospective nominees of a single party. In a closed primary the voter must be a member of the party among whose potential nominees he is choosing, but in an open primary the voter may select the primary ballot for any single party, regardless of whether he is a member of that party. 984 F. Supp. at 1291. Open and closed primaries are, by definition, partisan in that they result in the selection of party nominees.[5]

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[4] Louisiana uses nonpartisan primaries to narrow the field for its final ballot. 984 F. Supp. at 1292. Several elective offices in California are likewise chosen through nonpartisan primaries and runoff elections. *See Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 219 (1989) (referring to "nonpartisan school, county, and municipal elections"). Those California primaries are not at issue in this case.

[5] Most of the debate over the degree of openness or closedness turns on how one goes about establishing "membership" in a party prior to asking for that party's ballot. If a State has made "membership" in a party less meaningful and easily switched before and after an election, there is less of a distinction between open and closed primaries. Both are nonetheless partisan and limit a voter to a single party's nominating ballot. Furthermore, even in an open primary, many persons take their choice of a party ballot as a political statement, and the parties may well find value in such an indication of affinity. Indeed, in some states some parties voluntarily use an open or open-to-independents primary as a means of drawing in potential supporters. But the *voluntary* use of an open primary by a party is merely an exercise of freedom of association, not a compulsion of association.

The third type of partisan primary is a blanket primary. In a partisan blanket primary the voter may vote for any candidate from any party on an office-by-office basis without being limited to a single party's ballot. *Id.* at 1291-92. The candidates themselves, however, are competing only against others from their own party for that party's nomination. The voter is thus voting only to determine a single party's nomination decision with any given vote and can essentially switch parties with each individual vote.

In contrast with the various types of partisan primary, there also exists a species of *nonpartisan* primary. A nonpartisan primary is necessarily of the "blanket" type because any voter can vote for any candidate as there is only one comprehensive ballot. The nonpartisan blanket primary differs from all three types of partisan primary, however, in that it is not designed to select the nominees of a particular party, and access to the final ballot does not turn on party affiliation or endorsement. A nonpartisan primary is simply a preliminary test of support for each of the candidates, which is then used to winnow down the final field for the general election. *See* 984 F. Supp. at 1292 (Louisiana's "nonpartisan primary differs because '[t]he two top vote receivers, regardless of party, meet in a subsequent (runoff or general) election.'") (quoting expert witness report).

Prior to Proposition 198, California held closed primaries. Under Proposition 198, however, "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote ... at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation." § 2001. Because the results of the primary still only determine the nominees for each party, Proposition 198 changes the system from a closed primary to a partisan blanket primary.

It is the synergistic effect of the "blanket" nature of Proposition 198 and the partisan nature of the primary required by § 15451 that raises the constitutional issue in this

case. The voters now allowed to cross party lines are not merely framing the choice of candidates on the final ballot, they are selecting *party nominees*.

SUMMARY OF ARGUMENT

By allowing voters to cross party lines, office-by-office, in a partisan primary, Proposition 198 compels party members to associate with persons who do not share their political and ideological goals and who do not have the interests of the same party at heart. Because such cross-over voters can influence, and sometimes determine, who shall be the nominees of parties not their own, and because the parties are then compelled to identify such nominees as *their* own, Proposition 198 compels expressive association and speech in violation of the First Amendment. In simplistic terms, it allows Democrats to choose the Republican nominee, Republicans to choose the Democratic nominee, and independents to choose the leaders of parties that they refuse to associate with at all. Such a system, when imposed upon unwilling parties, is a severe and unconstitutional burden on the freedom of speech and association.

Amici will focus on the relationship between private partisan speech and association and the constitutional presuppositions of our republican democracy. Both the text and the structure of the Constitution reflect the essential sovereignty of a free People. They also reflect the checks and balances designed to ensure that the People remain free to play their democratic roles yet not fall victim to the passions or desires of temporal majorities, no matter how well-intentioned. The First Amendment thus protects free speech and association so that the People remain free to generate a diversity of viewpoints and that dissident views be allowed to flourish.

Freedom of speech and association not only ensures the free development and transmission of viewpoints essential to the freely given consent of the governed, but also provides one of the few acceptable checks on the various factions that

are inevitable in a free society. In the Founders' view, factions were to be controlled not by seeking to eliminate them, but by ensuring a multiplicity of factions such that each would hinder the others from gaining a controlling majority. It was through a broad freedom of speech and association, and the encouragement of multiple competing factions, that our republican democracy was designed to endure. These structural principles call for rigorous protection of First Amendment freedoms, most especially in the context of political speech and association.

In this case, Proposition 198 as superimposed upon California's partisan primary system creates a severe and content-based burden on the First Amendment rights of political parties and their members. The resulting partisan blanket primary compels parties and their members to allow their ideological adversaries to participate in the selection of party standard-bearers and compels parties to nominate as candidates persons they may not endorse. And it does so with the express purpose of altering the *viewpoint* of the parties' speech. The law should thus be analyzed under strict scrutiny applied in the traditional, and almost invariably fatal, manner. And even were the Court to apply *ad hoc* balancing, the nature of the burden is such that only a compelling and necessary state interest could balance the scales.

The alleged state interests in this case do not justify the constitutional burden imposed by Proposition 198. The burdensome aspects of a partisan blanket primary are completely unnecessary to reach the State's claimed goals. There is no intrinsic connection between manipulating the party *nomination* process and ensuring ballot access for more popular or representative candidates or allowing enhanced voter participation. To accomplish such goals the State need only adopt a *nonpartisan* blanket primary, allowing universal voting and advancing a limited number of the top vote-getters regardless of party nomination. Such a system would neither rely upon nor interfere with political party endorsement processes. Par-

ties would remain free to identify their "nominees" for office, but would have no guarantee that their nominees would receive sufficient votes to make it onto the final ballot.

Aside from not necessitating the burden on First Amendment rights, the alleged state interests themselves are neither compelling nor sufficient to outweigh that burden. If anything, by trying to streamline the process through which the supposedly "moderate" majority may elect more candidates of like mind, California creates the very situation the Founders feared – one in which a majority faction can more easily form and impose its will on all others. Those attributes of the political system that the State describes as vices – members of different parties taking conflicting positions, no single set of candidates appealing to a majority of the population, legislative gridlock – are the very checks and balances that the Founders viewed as the unique virtues by which our republican democracy would avoid the pitfalls of faction that were fatal to so many democracies of the past.

ARGUMENT

There is no inherent connection between party nomination and access to the ballot. Any dependence of ballot access upon party nomination is artificially imposed by state law. Upon conceptually disentangling these two activities, it becomes apparent that, while the State may reasonably regulate ballot access, it may not do so at the expense of manipulating or interfering with party nominations.

I. The Role of Private Associations in a Republican Democracy.

The United States Constitution embodies a unique vision regarding the sovereignty of the People and the means by which the People exercise that sovereignty. Not only do the People exercise their sovereignty by periodically voting for representatives in local, state, and federal government, they

also exercise it on a daily basis by utilizing their constitutional rights to freedom of speech and association. The most significant means by which the People exercised their sovereignty, however, is through the Constitution itself, being ordained and established by "We The People of the United States." U.S. Const., preamble.

The timeless sovereignty of the People is best reflected in the First Amendment, which this Court has often recognized as the premier safeguard of genuinely free political decisions and free consent of the People. *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) ("*Eu*") ("the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (citation omitted); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 n. 12 (1978) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' ... And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'"). The First Amendment thus plays a "structural role" in "securing and fostering our republican system of self-government." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 587 (1980).

The free formation and advocacy of opinion so essential for valid popular consent to republican government has long been recognized to require protection not just for specific instances of speech or religious exercise, but also for the "ability and the opportunity to combine with others to advance one's views." *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 13 (1988). Such protected association preserves "political and cultural diversity and ... shield[s] dissident expression from suppression by the majority." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). Indeed, the First Amendment is designed to prevent temporal majorities from entrenching themselves and to ensure an avenue for

dissident or immoderate views that may someday capture the imagination and lead to a new direction.

A textual and structural understanding of the ongoing role of the People as sovereigns and as a source of diverse views that enrich and check government calls for a limited view of government power as it relates to belief, expression, and association. The Court thus should vigorously safeguard First Amendment freedoms at every step of the way, not letting past indirect encroachments pave the way for a final step into a more fulsome appropriation of the People's sovereignty.

II. A Partisan Blanket Primary Severely Burdens First Amendment Rights.

A primary election simultaneously blanket and partisan in nature is a creation at war with itself. On the one hand it seeks to give all voters a comprehensive choice among candidates in the primary, regardless of voter affiliation. On the other hand, it insists that the general election ballot be limited to those candidates endorsed, one each, by the political parties. The combination of these inconsistent notions leads to the undifferentiated electorate deciding who each of the differentiated parties must endorse. Therein lies the constitutional violation because the parties and their members have a First Amendment right to differentiate their speech and their associations.

A. Political Parties Are Private Expressive Associations Entitled to Full First Amendment Protection.

Political parties are perhaps the archetypal examples of expressive associations engaging in core First Amendment activities. *See Eu*, 489 U.S. at 222-23 (party endorsements are "speech which 'is at the core of our electoral process and of the First Amendment freedoms'") (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968)); *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) ("'The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.'") (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973)). One of the most essential of these activities is the selection of individuals to endorse and promote for election to government office. *Eu*, 489 U.S. at 223 ("a political party has a right to identify the people who constitute the association ... and to select a standard bearer who best represents the party's ideologies and preferences") (citations and internal quotation marks omitted). There are few expressive activities more directly tied to the sovereign right of the People to combine in order to advocate shared views and engage in the process of self-government.

The State would have us believe that political parties are not private expressive associations, but rather are arms of the State itself, at least insofar as their interaction with the election process is concerned. *See, e.g.,* Appellee's and Intervenor's Brief, *California Democratic Party* v. *Jones*, June 25, 1998 (CA9 Nos. 97-17440, 97-17442) (hereinafter "Appellee's Br."), at 5-6 ("Because of the role the State confers upon political parties in the electoral process, they are not simply private actors. Only parties get automatic ballot placement for their candidates ...."); *id.* at 26 (characterizing political parties as "State actor[s]"). As the court below observed, therefore:

> This case presents two competing views as to the function of the direct primary and, to some extent, as to the function of the political parties. From the parties' perspective, the parties are autonomous organizations and the primary is their opportunity to select their leaders and to define their positions on political questions. From the defendants' perspective, the primaries are the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders, and the political parties, as they operate to frame the choice of candidates, are a part of a highly regulated governmental activity – the election process.

784 F. Supp. at 1293.

The competition between views is, however, an artificial one. Any "state" character assigned to the parties is due to the State's laws, not to the inherent character of the parties themselves. Indeed, the only formal role of the parties in the election process actually consists of the State co-opting private expressive associations for government use. But despite being used as proxies for the State with regard to determining ballot access, these private entities retain their First Amendment rights. Any clash between the exercise of those rights and the role the State would rather they play cannot form the basis for denying First Amendment rights. If the State will not yield its interest to the Constitution, then it must cede its use of private entities to perform the governmental function of regulation ballot access.[6]

What this Court recently has said concerning Congress and the States, so too it might say concerning the relationship between *all* republican government and the private associations of the People: Government "may not treat these sovereign entities as mere prefectures or corporations," but rather must accord "the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty" in the People. *Alden* v. *Maine*, -- U.S. --, --, 119 S. Ct. 2240, 2268 (1999).

Recognizing that political parties have full First Amendment rights for their expressive and associative activities helps place in perspective the relevant First Amendment jurisprudence. For example, in *Timmons* v. *Twin Cities Area*

[6] The claim that the parties themselves benefit from certain aspects of their involvement with the State is no answer to the constitutional problem. Granting qualified political parties the "great advantage[]" of "automatic access for their candidates," Appellee's Br. at 26, is more accurately described as imposing the great disadvantage of restricted access upon non-qualified parties and independents. Requiring parties to alter core aspects of their speech and expressive association under threat of restricted ballot access is thus an unconstitutional condition upon such access.

New Party, the Court stated that regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." 520 U.S. 351, 358 (1997) (citations and internal quotation marks omitted). While the court below seems to have read *Timmons* as adopting a more lenient test for election regulations, the standard used is hardly different from the time, place, and manner jurisprudence applied in other First Amendment contexts. Viewed as of a piece with general First Amendment law, the notions of severe and limited burdens on speech are seen as requiring an inquiry into the nature of the constitutional burden, not just the substantive effect on parties – they require a qualitative test, not merely a quantitative one. Thus, a restriction based upon content or viewpoint, or that discriminated on the basis of the exercise of First Amendment rights, should be subject to strict scrutiny. Only nondiscriminatory, non-content-based restrictions implicate "lesser" burdens that may be balanced under a less rigorous standard.

B. A Partisan Blanket Primary Compels Ideological Speech and Association and Manipulates Private Decision-Making Processes.

"[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment). Yet at precisely the moment in which a political party is clearing its collective throat to speak on an essential issue – whom it believes should be elected to government office – the State compels it to add discordant voices to the chorus, thus changing the definition of the collective voice and in some cases the resulting message as well. As this Court has recognized in other contexts, forcing a group "to accept members it does not desire ... may impair the ability of the original

members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623.[7] The freedom not to associate is thus an example of the more elemental First Amendment principle that the State "may not compel affirmance of a belief with which the speaker disagrees." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). And "this general rule, that the speaker has the right to tailor the speech," fully applies to "expressions of value, opinion, or *endorsement*." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (emphasis added).

Proposition 198 violates these essential prohibitions against compelled speech and association. In those primary races affected by cross-over voting, the nominee of the party may be someone opposed by the party itself but favored by adversaries of the party. Even one such occurrence constitutes a severe burden on rights of association and can cause enormous damage to the public image of the party.[8]

The court below acknowledged that "there will be particular elections in which there will be a substantial amount of cross-over voting," that there "will be a small number of elections in which the cross-over vote proves decisive, and

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[7] Unlike race or sex, party affiliation involves self-definition of ideology or lack thereof, and cannot be treated as merely a basis of impermissible stereotyping.

[8] On a practical level, a party's nominees are its most important spokesmen in the eyes of the media and the public, and one nominee can enhance or destroy the reputation of the party. Just as one disastrous use of a trade name can ruin a corporation, one disastrous use of a party name can undermine the entire party. If, for example, cross-over voting results in the nomination of a racist, all other nominees of that party suffer. *Cf. Eu*, 489 U.S. at 217 n. 4 ("Democratic Party's nomination of a "Grand Dragon of the Ku Klux Klan [who] held views antithetical to those of the Democratic Party."). Just as a corporation has the general right to prevent misuse of its name by its adversaries, the First Amendment protects a political party from disingenuous selection of its spokesmen.

there will be other elections in which the possible importance of the cross-over vote will be an influence on the conduct of the primary campaign and the conduct of elected officials" 984 F. Supp. at 1298; *see also id.* at 1299 ("[I]t is likely that in the fullness of time some California primary races will be decided by cross-over voters, even if the number of such occasions is not large."). Whether the cross-over voters are sincere, strategic, or malicious has little to do with the constitutional burden. What right do Democrats have to insist, sincerely or otherwise, that the Republicans nominate more liberal candidates for public office?[9] "[T]the choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 574-75.

The party "nominees" resulting from California's primary will be perceived as the candidates endorsed by the parties whether or not the primary victories were attributable to non-party voting. The parties could thus be compelled to give seeming endorsements with which they disagreed. The parties then "may be forced either to appear to agree with [the compelled speech] or to respond." *Pacific Gas and Electric*

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[9] The court equated sincere voting with "benevolent" voting, though that normative label is rather inaccurate. At best the term harks back to the somewhat oxymoronic concept of benevolent dictatorship. The court also acknowledged that cross-over voting would occur where one party's nominee was likely to win the subsequent general election. 984 F. Supp. at 1299. Voters from the party in the minority who cross over to influence the nominees of the majority party are always insincere given that they will still vote for their own party's candidate in the general election. That the cross-over votes were for the voters' *second*-choice candidate does not soften the objection if it denies the majority party the ability to nominate *its* first-choice candidate. Furthermore, while the court below discounted the practical *impact* of "raiding" – crossing over to maliciously vote for a person thought to be the weaker opponent for the general election – the evidence it cited establishes that such behavior will nonetheless occur under a blanket partisan primary. *See* 984 F. Supp. at 1297 (citing evidence suggesting that 5-10% of cross-over voters do so maliciously).

Co. v. *Public Utilities Comm'n of California*, 475 U.S. 1, 15 (1986) (plurality opinion) (citation omitted).

The court below discounted the severity of the First Amendment burden by arguing that a "party may still endorse a candidate and may throw financial support to a particular candidate." 984 F. Supp. at 1300. But in any instance where Proposition 198 achieves its intended effect – causing nomination of someone more "moderate" than the party itself would select – this is of little comfort. A party saddled with a "nominee" it does not endorse, but who nonetheless will carry the party flag into the election, would then face the burden of having to disavow its compelled nominee in order to express its true views. As with the parade in *Hurley*, "there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected" nominees. 515 U.S. at 576. And, as the plurality in *PG&E* noted, if "the government [were] freely able to compel ... speakers to propound political messages with which they disagree, ... protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." 475 U.S. at 16.[10]

The relevant criteria for measuring the constitutional burden of cross-over voting are not its motive, nor how often it will occur or change the result, but whether it will *ever* occur or *ever* change the result. Even one instance of cross-over voting in a partisan primary forces a party to associate with those whom they would exclude on purely ideological bases. And even one instance of altering the result of a nomination

[10] Furthermore, given California's "sore loser" statute, § 8003, a party's true choice will then be excluded from the general election ballot entirely – regardless of whether his support exceeded that of other candidates included on the general election ballot – all because he came in second to a person with fewer votes within the party but with more votes among people not even members of the party. Indeed, a candidate could have the second-highest vote-count of *any* candidate in the primary yet still be excluded from the general election ballot.

process – or just the margin between contenders – alters the collective voice of the group. The burden is "severe" every time. And given that the alleged benefits from Proposition 198 *only* occur where there is crossing over and where the result is affected thereby, it does not matter how frequently crossing over occurs. Under California law, the claimed benefits are pegged to the very behavior – crossing over with an impact on results – that is itself burdensome. 984 F. Supp. at 1297 ("[D]efendants can hardly dispute [that cross-over voting will be more prevalent after Proposition 198] while maintaining that the State's interests are furthered by a blanket primary precisely because it facilitates cross-over voting."). At a minimum, both sides of the constitutional equation rise and fall together in the same proportion whether crossing over occurs rarely or often.[11]

Furthermore, many burdens occur even when there are no benefits. In terms of the effects on parties with electable nominees, the benefits of Proposition 198 only occur when the result of the primary is altered, but the burdens occur with every cross-over vote. As for smaller parties whose nominees have little chance in the general election, there is no supposed benefit whatsoever, but the constitutional burdens may be especially severe. Newly emerging parties are particularly vulnerable to cross-over voting due to the small number of votes involved. Abraham Lincoln's efforts to base the newly formed Republican Party on clear principles could have been frustrated by cross-over voting by slavery sympathizers. Indeed, the selection of merely one slavery sympathizer as a Republican Party nominee could have derailed Lincoln's ability to represent the Party's position in a forceful and unequivocal manner. Yet Proposition 198 makes it easy for a

[11] Although the burdens and benefits are not *inherently* bound to each other, *see infra* at 20-22, the partisan blanket structure of California law causes them to be so bound.

vested, powerful interest to destroy any new party founded to challenge such interest. [12]

Proposition 198 not only compels speech and association, it does so on the basis of viewpoint. Proposition 198's ballot statement included the purpose of selecting "more moderate problem-solvers," as opposed to strongly principled candidates. 984 F. Supp. at 1290. Indeed, the State unashamedly claims as a virtue its effort to reduce the impact of party loyalists on the parties' nomination processes. That the restriction is supposedly multi-directional – equally burdening all viewpoints deviating from the norm – does not save it. The restriction is still viewpoint-based in terms of restricting speech according to the viewpoint it *lacks* – the centrist viewpoint – rather than according to the viewpoint it has. The choice to burden all save one viewpoint is just as much a content-based decision as is a speaker's choice to *include* all save one viewpoint. *Cf. Hurley,* 515 U.S. at 569-70 ("a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech"). [13]

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[12] While few people may cross over to a minor party in the hope of eventually electing such party's nominee, it is quite easy to envision people crossing over to defeat a particularly disfavored contender. This would be "sincere" in the sense that the cross-over voters truly *dislike* one of the options, but it is no less malicious therefor. Anyone familiar with New York politics could easily imagine cross-over voting under a partisan blanket primary if the controversial Al Sharpton sought nomination by a minor party. Some might find the effort worthwhile to keep Sharpton out of the general election regardless of whether they thought his minor-party alternative had any chance at all.

[13] The supporters of "moderate problem-solvers" should create a political party for their purpose, or make their case within the decision-making processes of existing parties. For example, voters could form the "Can't We All Just Get Along Party" and then nominate and potentially elect their own candidate. Nominees from the Can't We All Just Get Along Party, if triumphant in the political marketplace of ideas, could then govern our nation pursuant to a principle of avoiding legislative gridlock. Proposition 198, however, seems to operate on the premise that it is not the meek who shall inherit the State of California, but rather the penultimately lazy. Too apathetic to form their own political party, they still manage to get to the polls every now and again and so demand the right to co-opt the party processes of others for their own ideological use.

Finally, Proposition 198 not only burdens associational rights directly, it adds a significant level of state-sponsored corruption to the decision-making process leading to party nominations. Like cash incentives for persons to vote against their consciences, partisan blanket primaries motivate persons to vote against their consciences and against their beliefs as measured by self-declared party affiliation. Even if the incentive does not alter the behavior of some or many, the mere presence of the incentive – like a standing offer of a bribe – is corruption itself.

Given the tremendous burdens on the rights of parties and their members to be free of compelled speech and association, only a strict necessity to use Proposition 198 to further a compelling interest can even begin to justify the law. Neither necessity nor any compelling interests exist in this case.

III. The Constitutionally Burdensome Aspects of a Partisan Blanket Primary Do Not Advance a Compelling State Interest.

The court below upheld Proposition 198 based upon several supposedly "compelling" state interests. 784 F. Supp. at 1303. Such interests included: decreasing the "election of party hard-liners" and promoting the election of "more moderate problem-solvers"; avoiding "legislative gridlock"; increasing "voter participation," particularly by "disenfranchised" independents and minority party voters in safe districts; protecting "voter privacy"; and enhancing the "voters' belief in the fairness of the electoral process." 784 F. Supp. at 1290, 1301, 1303 (citation and internal quotation marks

omitted). But not a single one of these interests is dependent upon the burdensome aspects of California's partisan blanket primary. Each can be advanced as well or better by less burdensome means. Furthermore, none of the interests is compelling in this case, and some are at odds with the republican system of government envisioned by the Founders.

A. No Inherent Connection Between State Interest and Burdensome Means.

Each of the State's interests turns on providing all voters the ability to select among all available candidates in the primary, thereby making the general election choices better reflect the aggregate views of the public rather than the views of the party faithful. But providing voters with unrestricted choice in a primary has nothing to do with whether the results of their collective choosing must be imposed upon and imputed to the various political parties as their supposed nominees. The alleged benefits of Proposition 198 are all a function of ballot access, not party nomination. A primary system that provided the same voter choice, but that did not purport to speak for the parties or compel their association with particular candidates, would provide all of the benefits of Proposition 198 without the First Amendment burdens. Such a system would be a *nonpartisan* blanket primary.

That ballot access in California currently happens to be partisan, and thus a function of party nomination, does not justify burdening the nominating process. Party nomination, at its core, is nothing more than speech: it is the endorsement by an association of citizens of one of its members, and the communication of that endorsement to the general public. Because the connection between partisan nominations and ballot access is due only to state fiat, declaring a state interest on the grounds that party nominations determine ballot access is tantamount to allowing the State to manufacture its own interest at the stroke of the legislative pen. The State is in effect trying to bootstrap itself into an interest by having imposed the determinative relationship and then pretending that it is not responsible for, and not capable of undoing, the now-bothersome connection.

Thus, regardless of the strength of the state interests in this case, none of those interests is advanced by the particular aspect of state law creating the constitutional burden.

That it is wholly unnecessary to burden First Amendment rights in order to advance the State's alleged interests can be seen by a comparison between a partisan and a nonpartisan blanket primary. The only relevant differences between a partisan and a nonpartisan primary are that in the partisan variety: (1) the parties are obliged to identify as "their" nominee the top vote-getter belonging to their party, regardless of whether the person received the highest number of votes from party members; (2) one so-called "nominee" from each registered party gets on the final ballot regardless of how few total votes such a person may have garnered; and (3) the runner up vote-getters belonging to each party typically are excluded from the final ballot regardless of how many total votes they may have received and regardless of whether they received more votes than the "nominees" from other parties.

The first of these differences is the source of the First Amendment burdens described in Part II. The other two differences actually cut against California's alleged interests because under a partisan system, certain candidates reach the final ballot despite their lack of support, while other candidates are excluded from the final ballot despite their substantial popular support. A nonpartisan system thus would better advance California's alleged interests without compelling speech or association. This comparison thus demonstrates not only that the State's infringement on First Amendment rights is gratuitous, but also that the unconstitutional aspects of California's system are even counterproductive regarding the State's purported goals. There is thus no need to hijack the party endorsement process to further any interests, compelling or otherwise.

If the State does not like the candidates nominated by the parties, it is free to sever the connection between party endorsement and ballot access and come up with a neutral method for determining which candidates to permit on the ballot. While each State is certainly free to explore a variety of methods in "its own experiment in democratic government," 984 F. Supp. at 1303, it is not free to ignore the First Amendment in the course of such experiments.

While the State may prefer to use private speech and associative behavior as a proxy for the underlying interest it has in limiting ballot access to those with some minimum of support, it is not at all clear that such a preference is a constitutionally significant (or valid) interest. But once the private speech and association ceases to be a reliable or desirable proxy for the valid underlying interest in limiting ballot access to those with a demonstrated minimum of support, the State is not justified in compelling an alteration in the private speech and association to better suit its needs. Rather, it must search for a different proxy or it must pursue its underlying interest directly and through its own means. Private associations must be left free to speak and to associate on such grounds of belief as they see fit. The government may not act to alter such private speech and association merely because it finds such activities insufficiently useful to serve some other goal. "Such plenary [government] control of [private self-]governmental processes denigrates the separate sovereignty of the" People. *Alden*, -- U.S. at --, 119 S. Ct. at 2264.

B. The State's Alleged Interests Are Not Compelling.

While the State's alleged interests can be as well or better served by a nonpartisan primary, the State has *no* valid interest in altering the partisan endorsement decisions of the parties for their own sakes. There is no valid state interest in saving the parties from themselves or making their *nominees* more palatable. *Eu*, 489 U.S. at 227, 232.

The alleged interest in diminishing partisanship and extreme candidates is not only unrelated to the endorsement aspects of the partisan primary, but if it were related to those aspects, the interest would be improper. In *Hurley*, this Court addressed an analogous potential interest in "produc[ing] speakers free of the [disfavored] biases, whose expressive conduct would be at least neutral toward the particular classes," but noted that such a goal "is a decidedly fatal objective." 515 U.S. at 579. This Court went on to explain that

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

515 U.S. at 579.

Eliminating partisan strife or legislative gridlock also is not a compelling State interest. The checks and balances of our Constitution are designed to promote partisan strife and legislative gridlock in order to block single-party domination. Indeed, Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, The Federalist Papers 45 (Rossiter & Kesler eds. 1999). While California and the court below seem to think of Proposition 198 as a means of eliminating the cause of faction by placing more decisions into the hands of the more "moderate" majority of electors, this misunderstands the entire problem of faction as it concerned the Founders. Madison correctly recognized that "the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*." *Id.* at 48 (emphasis in original). The solution is not to undermine the conflicting factions and replace them with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49.

When the problem of faction is seen in its historical context, Proposition 198 does not solve the problem, it worsens it by creating a mechanism for a majority faction to oust the competing minority factions of the various parties. But the "greater security" is to be found in a "greater variety of parties, against the event of any one party being able to outnumber and oppress the rest." *Id.* at 52. Multiple competing and antagonistic parties are the very solution to the far more dangerous threat of cooperative problem solvers who will more easily act in concert to accomplish the wishes of the majority faction California now wishes to empower. Far from being compelling, therefore, California's goals are anathema to the "republican remedy for the disease[]" of factionalism. *Id.*

The weight of California's remaining goals is undermined by the contradictory aspects of a primary that is simultaneously partisan and blanket in nature. As noted above, by opting for a *partisan* blanket primary, California creates a system of conflicting tendencies and effects. While it claims to seek more representative candidates, the State actually excludes candidates who have significant voter support but came in second in their own party, and includes candidates with extremely limited voter support but who happened to win a minor party primary. While there may be good reason to favor diversity of candidates over popular support, they are not reasons that California has given for Proposition 198 and they are not reasons that can be reconciled with the populist interests that the State has given. These contradictory aspects of the California primary system thus undermine the significance of the State's alleged interests. *See Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, -- U.S. --, --, -- S. Ct. --, -- (1999) ("[T]he federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal. ... [W]e cannot ignore Congress' unwillingness to adopt a single national policy that consis-

tently endorses either interest asserted by the Solicitor General.").[14]

Because a *partisan* blanket primary is entirely unnecessary to advance California's alleged interests, and because those interests are not compelling, they cannot justify the severe burden on First Amendment rights created by Proposition 198.

* * * * *

The various guarantees contained in the Constitution are not subject to the outcomes of some referendum or the shifting preferences of tomorrow's simple majority:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638. The Constitution's confirmation of the right to freedom of speech and association represents the People's will in the most fundamental sense; expressed in a moment of clarity and extraordinary cohesion, designed to speak for the ages, and capable of change not as a result of limited majority, but at best only through the further clarity and cohesion inherent in the amendment process. In this case, the People's will as embodied in the Constitution requires that

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[14] As for the alleged interest in voter confidence in the system, the court below cited expert testimony acknowledging that merely the "'potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore.'" 984 F. Supp. at 1298 (citation omitted). Creating a system with incentives for raiding thus undercuts the State's purported interest in public perception of a fair process, regardless of whether that public's perception is accurate.

the partisan blanket primary imposed by Proposition 198 be struck down.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Ninth Circuit should be reversed.

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